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Supreme Court, U.S.
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No. 03-815

IN THE

Supreme Court of the United States

SPRINGWELL NAVIGATION CORPORATION,

Petitioner,

v.

THE CHASE MANHATTAN BANK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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For purposes of deciding whether to grant certiorari, the most salient aspect of respondent's Opposition is its silent concession of the three discrete circuit splits identified by petitioner Springwell. Those splits involve: (1) the degree of deference given to the choice of forum by a citizen-equivalent plaintiff; (2) the degree of deference given to a plaintiff's choice of the *defendant's* home forum; and (3) whether *Gilbert*'s compulsory-process factor requires some showing that non-resident witnesses would be "unwilling" to attend trial in the chosen forum. Each of those splits involves a significant issue concerning the legal boundaries of the *forum non conveniens* analysis that deserves this Court's attention. Together, they present an especially efficient opportunity for this Court to reestablish the inter-circuit uniformity of legal rules in a long-neglected area of the law that is sorely in need of this Court's guidance.

STATEMENT OF THE CASE

As described in the Petition, this case involves facts and wrongdoing in multiple locations, including New York, London, Jersey, Moscow, and Greece. Pet. 3-5. Respondent's selectively distorted description of the case as involving nothing more than the acts and omissions of a salesperson in London is simply wishful fiction. Even the district court conceded that at least two of the counts in Springwell's complaint involve direct misfeasance by Chase New York personnel, Pet. App. B12, B14, and it is undisputed that Stuart Gager, who was responsible for Springwell's account during the relevant period and whose actions and failures constitute many of the alleged wrongs, ran the Hellenic Group from New York. This case thus unquestionably has substantial connections with *both* New York and London, and the facts and allegations of the complaint relating to New York are plain in the record.

Ultimately, however, Chase's fictional narrowing of the case to only that subset of conduct that occurred in London is

irrelevant to the questions presented by the Petition. The deference question turns on Springwell's treaty-based right to citizen-equivalent freedom of access to U.S. courts and on *Chase*'s residence in New York. The compulsory-process question turns on the undisputed absence of any evidence or finding that friendly Chase witnesses would be unwilling or unable to appear in New York. And the foreign-law question turns on the conceded applicability of mixed New York and English law to the various claims in the compiaint. Aside from atmospherics, therefore, Chase's distorted description of the facts has nothing to do with the issues this Court is being asked to decide or the appropriateness of granting certiorari.

The questions presented by Springwell's petition each raise clean issues of law that are ripe for this Court's resolution and this case is an excellent vehicle for addressing those issues. It is not the facts as found that are in contention, but rather the legal relevance of those facts, the legal standards against which those facts must be measured, and the legal requirement for the consideration of additional facts that were *not* found or even considered by the courts below. Had the proper legal standards been applied to this case, the outcome would necessarily have been different, and clarification of those legal standards will have a beneficial impact well beyond the particular facts of this case.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT APPLIED THE WRONG STANDARDS OF DEFERENCE, IN CONFLICT WITH OTHER CIRCUITS.

A. Treaty-Based Deference to Choice of a U.S. Forum.

The Second Circuit in this case disparaged the significance of the U.S.-Liberian treaty for purposes of deference, denying that the treaty provided court access equal to that of U.S. citizens and dismissing the importance of "citizen"-equivalent access in any event. Such erroneous holdings do

great damage to the value of the U.S.-Liberian and similarly worded treaties and create a conflict with other circuits that give substantial deference based on citizenship.

Respondent makes no attempt to defend the Second Circuit's erroneous interpretation of the U.S.-Liberian treaty as providing less than citizen-equivalent deference. Instead it only claims that the district court gave petitioner the same deference as a non-resident United States citizen. BIO 2, 12. But the deference given by the district court was trivial at best, and well below the deference accorded by other courts based on citizenship *per se*, aside from residence. *Compare* Pet. App. B10, B17 ("plaintiffs' choice of forum should not be accorded particularly strong deference, even assuming the Liberian treaty grants plaintiffs' choice some extra modicum of deference"; as non-residents, "plaintiffs deserve the minimum deference due them as treaty beneficiaries"), *with Burt* v. *Isthmus Development Corp.*, 218 F.2d 353, 357 (CA5) ("courts should require positive evidence of *unusually extreme circumstances* * * * before exercising any such discretion to deny a citizen access to the courts of this country") (emphasis added), *cert. denied,* 349 U.S. 922 (1955) *and Reid-Walen* v. *Hansen,* 933 F.2d 1390, 1394 (CA8 1991) ("the relevant distinction is whether or not the plaintiff who has selected the federal forum is a United States citizen").

Furthermore, the Second Circuit denied even the inadequate deference given by the district court, holding that "the Liberian treaty does not afford the plaintiffs' choice of a United States forum the same deference as that afforded the choice of a U.S. citizen." Pet. App. A11. And even discussing the hypothetical maximum of citizenship-based deference, the court denigrated the value of citizenship as irrelevant to convenience and hence refused to assign a supposedly "artificial weight to citizenship." Pet. App. A12. Such cavalier dismissal of the deference due citizens and citizen-equivalent litigants is in plain conflict with the significant deference triggered by citizenship itself in the Fifth and Eighth Circuits.

Respondent's non sequitur response that citizenship does not provide absolute *immunity* under *forum non conveniens*, BIO 13, 17, does nothing to rebut the importance of the substantial deference owed to foreign litigants with treaty-based "freedom of access to the courts and citizen-equivalent rights to bring suit in the United States. A lack of absolute immunity is fully consistent with the still substantial insulation from dismissal that proper citizen-equivalent deference provides to citizen litigants.[1]

Appropriate deference may not prevent dismissal in *exceptional* cases where two foreign parties are remitted to either the plaintiff's or the defendant's home forum abroad, but it certainly stands as a barrier to dismissal of this unexceptional suit against a New York defendant in a New York forum on claims that involve conduct spanning multiple jurisdictions *including* New York. That only three of the ten *Gilbert* factors are even alleged to apply to this case at all amply illustrates the tenuous and unexceptional nature of the balance and the consequence of an incorrect determination of deference. Had the courts below applied even a semblance of the

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[1] The holding in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989), that the U.S.-Liberian treaty's court-access provision is subject to "local laws" such as the Foreign Sovereign Immunities Act does nothing to support the decision below. The issue here is not whether *forum non conveniens* applies *at all* – petitioners have never suggested that it does not – but rather whether the discriminatory focus on a treaty-beneficiary's *residence* denies freedom of access by converting *forum non conveniens* dismissals into the presumptive rule rather than the rare exception. Unlike the FSIA, such a restriction on access based on residence is precisely *not* the sort of general "local law" contemplated by the treaty's access provision. Where the treaty intends residence to be controlling, it expressly says so. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Liberia, 54 Stat. 1739, Art. I (assuring equality of taxes for nationals of either party "within the territories of the other"); *id.* Art. XVIII (assuring certain equal rights and privileges to nationals of either party "within the territories of the other").

appropriate deference, it would have been apparent that this case should remain in New York.

Even the cases cited by respondent illustrate the point that the dismissal of a citizen plaintiff requires a far greater imbalance in convenience than is alleged to exist in this case. For example, in *Forsythe* v. *Saudi Arabian Airlines Corp.*, 885 F.2d 285, 290-91 (CA5 1989), the defendant was a foreign corporation that was an instrumentality of the Saudi Arabian government, plaintiff was a U.S. citizen who was a pilot employed and eventually fired by defendant in Saudi Arabia, Saudi Arabian law exclusively governed the case, and defendant sought to have the case transferred *to its home forum* of Saudi Arabia where all documents and witnesses were located. That overwhelming set of facts was sufficient to overcome substantial deference to the U.S. citizen's choice of forum but it is a far cry from this case where Chase was sued *in its own home forum* on at least two counts that even the district court conceded were based on conduct by Chase New York personnel. *See, e.g.*, Pet. App. B12, B14.[2]

Because the virtually non-existent deference applied by the Second Circuit effectively vitiates the "freedom of access" granted by the U.S.-Liberian treaty and conflicts with the def-

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[2] The two district court cases cited by respondent likewise involved foreign defendants being dragged away from their home fora and seeking to return to their home fora outside the United States. *Meridian Seafood Prods., Inc.* v. *Fianzas Monterrey, S.A.*, 149 F. Supp.2d 1234, 1236, 1238 (S.D. Cal. 2001) (Mexican defendant with no business, employees, or offices in California, seeking transfer to home Mexican forum for case involving exclusively Mexican business activity governed exclusively by Mexican law); *Donald G. Atteberry, DVM, P.A.* v. *Barclays Bank PLC* (*In re Donald G. Atteberry, DVM, P.A.)*, 159 B.R. 1, 7-8 (D. Kan. 1993) (English defendant with no apparent contacts with Kansas seeking transfer to home English forum for case involving money wired to, deposited, and held in England and governed exclusively by English law). Again, such circumstances are overwhelmingly more inconvenient than Chase being sued in its home forum, and hence understandably sufficient to overcome even the significant deference accorded citizen-plaintiffs.

erence accorded by other circuits based on citizen-status *per se*, this Court should grant certiorari.

B. Plaintiff's Choice of Defendant's Home Forum.

Respondent makes no effort to reconcile the Second Circuit's refusal to apply substantial deference to plaintiff's choice of *defendant's* home forum with the considerable deference given such a choice by four other circuits. *See* Pet. 12-13 (citing cases from the First, Third, Eighth, and Tenth Circuits). Indeed, respondent says absolutely nothing in defense of the Second Circuit's complete disregard of the choice of defendant's home forum as an element of deference. Instead, respondent merely repeats the various reasons why London would be an appropriate alternative, BIO 13, which simply ignores the question. The very point of deference is that it creates a substantial barrier to dismissal regardless of the availability of other appropriate fora.

The substantial deference due the selection of a defendant's home forum was squarely raised and expressly rejected below and the Second Circuit's denial of deference is in direct conflict with substantial deference given to such a selection in other circuits. Respondent does not deny the conflict, does not defend the Second Circuit's treatment of this deference issue, and offers not a single reason why this Court should not grant certiorari to resolve the issue.

II. THE SECOND CIRCUIT ELIMINATED WITNESS UNWILLINGNESS TO APPEAR AS AN ELEMENT OF *GILBERT*'S COMPULSORY-PROCESS FACTOR, IN CONFLICT WITH OTHER CIRCUITS.

As with the deference conflicts, respondent makes no attempt to deny the conflict created by the Second Circuit's refusal to require some evidence of "unwillingness" to appear on the part of non-resident witnesses as an element of *Gilbert's* compulsory-process factor. Pet. 16 (citing cases from First, Fifth, and Ninth Circuits). Instead, respondent simply asserts that this Court's discussion of witnesses in *Piper Air-*

craft Co. v. *Reyno*, 454 U.S. 235, 258-59 (1981), contains no such requirement. BIO 14-15. Nothing in *Piper* even remotely contradicts the element of unwillingness established by *Gilbert* as part of the compulsory-process factor.

In *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947), this Court established a clear dichotomy in the private interest factors relating to witnesses. Where non-resident witnesses are "willing" to attend trial in the chosen forum, the only witness consideration in the *Gilbert* balance is the "cost of obtaining [their] attendance," 330 U.S. at 508 – a consideration the district court found irrelevant here given the presence of numerous witnesses in both competing fora. Pet. App. B16. The availability of compulsory process only comes into play for the "attendance of unwilling" witnesses, 330 U.S. at 508, and has no legal significance in the absence of some evidence of such unwillingness.

This Court's observation in *Piper* that defendants are not required to particularize the testimony of each prospective witness in no way contradicts the willing/unwilling witness dichotomy established by *Gilbert*. Rather, *Piper* contains the perfectly consistent requirement that defendants "must provide enough information to enable the District Court to balance the parties' interests * * * [such as] affidavits *describing the evidentiary problems* they would face if the trial were held in the United States." 454 U.S. at 258-59 (emphasis added).

In *Piper* this Court found that the defendants had indeed provided "affidavits describing the evidentiary problems they would face," and those affidavits made it self-evident that the witnesses in question – hostile third parties to whom defendants intended to shift the blame for the air crash at issue – would be unwilling to appear voluntarily in the United States. *Id.* at 259 & n. 27 (foreign witnesses to include, *inter alia*, "the relatives of the decedents; the owners and employees of McDonald; the persons responsible for the training and licensing of the pilot; the persons responsible for servicing and maintaining the aircraft"; noting "problems posed by the in-

ability to implead potential third-party defendants" for claims "that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company"). The "unwillingness" of those hostile witnesses to appear voluntarily and hence the need for compulsory process was self-evident and amply supported by the record and the findings in *Piper*.

In the present case, by contrast, there was neither any evidence nor any finding of "evidentiary problems" given that the supposedly non-resident witnesses identified by Chase were never even claimed to be unwilling or unable to appear in the United States.[3] Indeed, such witnesses were all self-evidently *friendly* to Chase and hostile to Springwell, the precise opposite of the case in *Piper*. The mere fact that they supposedly resided in England rather than the U.S. is not itself any "problem," particularly in light of the district court's express finding that the costs of having witnesses travel to either forum was *not* a problem and hence *not* a factor favoring dismissal. Pet. App. B16. Absent evidence and findings that witnesses were unwilling or unable to appear in New York, the courts below lacked the "information" required to count this factor against a New York forum and thus erred as a matter of law in weighing it strongly in favor of dismissal.[4]

In any event, however, respondent's misreading of *Piper* does nothing to reconcile the conflict with three other circuits that recognize the requirement of "unwillingness" well after this Court's *Piper* decision. Given that the compulsory-

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[3] As it turns out, several of the witnesses alleged to reside in London in fact *do not reside there* and are no more subject to English compulsory process than to American compulsory process. Springwell Br. 39-40; Springwell Reply 18.

[4] Indeed, the refusal to require some showing that Chase's witnesses would be unwilling to appear in New York was especially perverse given the simultaneous rejection of the need for compulsory process over New York witnesses because Springwell had not "demonstrated" that such witnesses "would be unavailable at a trial in London." Pet. App. B16.

process factor is the *only* private interest even claimed to favor dismissal, BIO 10; Pet. App. B14-16, and was conceded to not "rise to the level of vexation or oppressiveness," Pet. App. B16, if the courts below erred as a matter of law by even considering that factor absent some indication of witness unwillingness to appear in New York, then dismissal would be plain error. This case thus presents an ideal vehicle for considering the proper legal scope of the compulsory-process factor within the overall *Gilbert* balance and for resolving the conflict created by the Second Circuit.

III. THE SECOND CIRCUIT ERRONEOUSLY APPLIED *GILBERT*'S FOREIGN-LAW FACTOR TO A CASE OF MIXED LAW OF COMMON HERITAGE.

As amply explained in the Petition, where both competing fora will have to apply some foreign law and the mixed law at issue shares a familiar and common heritage, the foreign-law factor should not play a significant role in the *Gilbert* balance. Various other courts have recognized the limited significance of that factor, Pet. 17-18, yet the courts below counted it "strongly" in favor of dismissal. Pet. App. A18.

Chase's only response is to suggest that the scope of the foreign-law factor is merely a factual issue that should not be revisited. BIO 15-16. But the question presented goes not to the facts or even the choice of law determinations made by the courts below. Rather, *assuming* that both English and New York law would apply to different parts of this case, as expressly found by the district court, Pet. App. B14 (New York law would apply to "negligent supervision claims as they relate to CMB New York and plaintiffs' conversion claims, which allege misfeasance on the part of CMB New York directly"), petitioner contends that such a finding of mixed law should have little or no *legal* significance in the *Gilbert* balance. The question presented thus asks for an up or down answer to a straight-forward question. At issue are

the legal constraints on the scope of this *Gilbert* factor, not the factual elements of that factor.

Once again, this case is an apt vehicle for addressing the limits of the foreign-law factor given that it was one of only two public-interest factors at issue. Error regarding the foreign-law factor thus would undermine an already thin balance of interests and tip the scales to a different result.

IV. THIS CASE RAISES IMPORTANT AND RECURRING NATIONAL ISSUES.

The importance and frequency of international disputes between U.S. and foreign companies involved in business activities spanning multiple fora are unchallenged by respondent. Similarly unchallenged is the significance of having predictably accessible venues for resolving disputes that arise from such business. The *forum non conveniens* questions presented by the Petition will affect disputes well beyond this individual case and thus require both a correct and consistent resolution that only this Court can provide. Multiple circuit conflicts and the virtual erasure of bilateral treaty rights concerning freedom of access to the courts will only complicate and hinder the efficient conduct of international business and undermine the credibility of the federal courts as effective arbiters of disputes with U.S. companies. Indeed, in an era where U.S. financial institutions are making a habit out of abusing the trust of their clients and customers around the world, restricting access to U.S. courts for complaints alleging such abuse and fraud would seem especially inappropriate. This case is an ideal vehicle for addressing significant questions in an area of law that has not received substantial attention from this Court since *Piper*, and that has suffered accordingly from inconsistency and confusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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